IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 20, 2008

STATE OF TENNESSEE v. MARLIN DALE BUTTON

Direct Appeal from the Criminal Court for Wilson County
No. 90-169 J.O. Bond, Judge

No. M2008-00609-CCA-R3-CD - Filed April 2, 2009

The appellant, Marlin Dale Button, pled guilty in the Wilson County Criminal Court to attempted aggravated sexual battery and received a six-year sentence with the manner of service to be determined by the trial court. After a sentencing hearing, the trial court ordered the appellant to serve the sentence in confinement. On appeal, the appellant contends that the trial court erred by denying his request for an alternative sentence. Based upon the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

James O. Martin, III (on appeal), Lebanon, Tennessee, and Thompson G. Kirkpartick (at trial), Manchester, Tennessee, for the appellant, Marlin Dale Button.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; and Jason Lawson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At the appellant's November 28, 2007 guilty plea hearing, the State gave the following factual account of the crime: In 1990, the appellant's daughter alleged that he came into the bathroom while she was bathing and touched her vaginal area. According to the victim, the incident happened sometime prior to her thirteenth birthday in 1986. Detective David Kennedy of the Wilson County Sheriff's Department interviewed the appellant, and the appellant told him that "if [the victim] says that I did that, then I did it." According to the appellate record, the appellant was charged with aggravated sexual battery in February 1990. However, before he could be arrested on the charge, he waived extradition to Florida and was returned to that state to face charges for sexual

crimes committed against children. After being convicted and serving a sentence of incarceration in Florida, the appellant moved to Michigan and then New York. At some point, he was extradited to Tennessee to face the charge in the instant case. The appellant pled guilty to attempted aggravated sexual battery, a Class C felony, and, pursuant to the plea agreement, received a six-year sentence.

At the appellant's sentencing hearing, Rosetta Howard, a Tennessee probation and parole officer, testified that she prepared the appellant's presentence report. In the report, the appellant admitted to touching the victim. Howard stated that the appellant had three prior convictions in Manatee County, Florida for attempted sexual battery of a child under the age of twelve. In the report, the appellant stated the following regarding his relationship with his family: "Past relationship was good except for my use of the children. My relationship with my wife was good as well."

On cross-examination, Howard acknowledged that the appellant was released from a Florida prison in July 2002 after serving twelve years in confinement. From that time until the appellant was extradited to Tennessee, he reported as a sex offender every three months in Michigan and was not charged with any other crimes. To Howard's knowledge, the appellant never violated any terms of probation or parole. She acknowledged that if the appellant received probation in this case, his plan of supervision included participation in sexual offender counseling; registration with the Tennessee Bureau of Investigation; payment of all court costs, fines, and restitution; and submission to random drug screens.

B.P.[1], the appellant's daughter, testified that she was taking a bath and lying in the bathtub when the appellant came into the bathroom and fondled her. The appellant asked the victim if she liked it, and she told him, "[N]o." She asked him to stop, and he said, "[I]n a minute, just be still." The victim did not remember what happened after that. She stated that she was about twelve years old when the incident occurred and that "it's impacted every aspect of my life." She stated that she currently was thirty-four years old, that she had dealt with anger issues and depression, and that she lived in constant fear. She said that she feared relationships with other people and that she did not trust anyone with her children. The appellant was the victim's biological father, and she lived with him until she was sixteen years old. The appellant was a single parent, and the family was heavily involved with their church. The victim stated that no one from the church knew about the abuse, that everyone thought the appellant was "this amazing Christian man," and that the appellant was a "master manipulator." The victim told the trial court that the appellant should be held accountable for his crime and required to serve his sentence.

On cross-examination, the victim testified that she was not treated by a psychologist or psychiatrist and did not receive any counseling due to lack of money. She said she did not believe anyone could be rehabilitated from this type of crime. She acknowledged that the bathroom incident

[1]It is the policy of this court to refer to victims of sexual offenses by their initials.

was the only indiscretion the appellant committed against her while she lived with him from 1985 to 1989. However, on redirect examination, the victim testified that although the bathroom incident was the last time the appellant sexually abused her, it was not the first time. She said he began abusing her when she was about four years old and that the abuse occurred two or three times per week.

The appellant testified that he lived in Tennessee from 1985 to 1990. Prior to living in Tennessee, he lived in Florida. He acknowledged that he abused his daughter in the bathroom about twenty years ago and that he confessed to Detective Kennedy in 1990. The appellant also acknowledged that upon being urged by his church, he "came clean" about all the offenses he had committed, including his offenses in Florida. When the appellant was transferred back to Florida, he thought his Tennessee case was "gone." The appellant pled guilty to various offenses in Florida, received a thirty-year sentence, and served twelve years in confinement. During his incarceration, he participated in sexual offender therapy, was treated by a psychologist, received a certificate for computer-aided design, and received several certificates for stress management courses. When the appellant was released from prison in July 2002, he moved to Michigan and lived there for five years. During that time, he reported every three months as required by the sex offender registry in that state. He then moved to New York and lived with his cousin until August 2007 when he was arrested in this case. From 2002 until his arrest, the appellant received only a speeding ticket.

The appellant testified that he had already served about six months in jail in this case and that he would continue to live in New York with his cousin and her husband if he received probation. He stated that his only source of income was social security, that he had never used illegal drugs, and that "I feel in my heart that I've been rehabilitated." He stated that he had not molested anyone in more than twenty-two years and that he had not thought about molesting a child in about ten years. He stated that he had had many opportunities to reoffend and that he was convinced he would not do so. He said that he knew what he had done to his daughter was wrong, that he had hurt her, and that he was sorry. He stated that the sentencing hearing was the first time he had seen the victim in eighteen years and that he would like to talk with her.

On cross-examination, the appellant testified that after he was released from prison in Florida, he was not on probation or parole. He acknowledged that he confessed to molesting six other children and that he told a doctor who interviewed him in jail that he also was able to touch children in public without their knowledge.

Suzanne Randall, the appellant's cousin, testified that after having no contact with the appellant for fifty years, she decided to try to locate him. She found him in a Florida prison. After the appellant was released from prison, Randall invited him to live with her in New York, but he moved to Michigan. He lived in Michigan for five years, and Randall continued to have contact with him. The appellant moved in with Randall and her husband in February 2007 and lived with them until his arrest in August 2007. The appellant was never alone with any children while he lived with Randall, and Randall never had any uncomfortable feelings about him. She stated that the appellant worked on a farm during the day and that he would continue to live with her if he received probation.

On cross-examination, Randall stated that she did not believe the appellant would reoffend, and she acknowledged that she was aware he had confessed to molesting at least six children. However, she was unaware that the appellant had molested boys as well as girls or that his risk to reoffend was considered high. She acknowledged that she still believed he was an upstanding person.

The State introduced the appellant's January 2008 psychosexual evaluation into evidence. According to the evaluation, the then sixty-five-year-old appellant did not appear to be entirely truthful, provided information to the psychologist that was misleading or untrue, and "could only appreciate the wrongfulness of his actions as they related to and affected him." The appellant also showed no remorse for his behavior and shifted the responsibility for his actions onto his victims by "alleging that his behavior was prompted by and encouraged by them." In the evaluation, the psychologist noted that the appellant seemed intent on convincing her that he had done well in sex offender treatment, and the appellant reported to the psychologist that his previous therapist said he was "cured." When the psychologist told the appellant there was no known cure for pedophilia, the appellant disagreed with her.

The evaluation reports that the appellant was married twice. The first marriage lasted four years and occurred when the twenty-two-year-old appellant married a fifteen-year-old. The appellant's second marriage was to a woman with five children, three boys and two girls, and he and his wife had a daughter, the victim, together. In 1975, the appellant was discovered to have molested one of his stepdaughters and attended some treatment sessions for pedophilia. In 1990, the appellant was convicted and sentenced in Florida for sexual offenses against his stepchildren. According to the evaluation, the appellant admitted sexually abusing his two stepdaughters, two of his stepsons, and two children who were friends of the family. The evaluation also states that the appellant admitted abusing other children, and the psychologist concluded that "[h]e is a pedophile who molested female and male family members as well as acquaintances over decades." Based upon the appellant's admitted acts, his refusal to accept responsibility for his actions, his lack of remorse, and his blame-shifting, the psychologist concluded that his risk to reoffend was high.

The State also introduced the appellant's presentence report into evidence. According to the report, the appellant was divorced and a high school graduate. He served six years in the United States Air Force and was honorably discharged. The report shows that the appellant worked as a home inspector for Insurance Inspection in Michigan from August 2002 until February 2007 and as a farm hand in Whitney, New York from February 2007 until he was arrested in August 2007. The report shows that in 1990, the appellant was charged in Florida with seven counts of sexual battery of a child under twelve, pled nolo contendere to three counts of attempted sexual battery of a child under twelve, and served twelve years of a thirty-year sentence.

The trial court referred to the victim's testimony about the affect of the crime on her life and found that the following enhancement factors applied: (1), that the appellant "has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range"; (4), that the victim was particularly vulnerable because of her age; (7), that "[t]he

offense involved a victim and was committed to gratify the [appellant's] desire for pleasure or excitement"; and (14), that the appellant abused a position of private trust. Tenn. Code Ann. § 40-35-113(1), (4), (7), (14). The trial court found no mitigating factors applicable. The trial court then stated as follows:

> The reports I have from experts shows that there was no -- that he was a pedophile. A pedophile, there's no cure for. You can treat and try to hold where you are, but there's never any way to get past that . . . feeling or desire that one would have.
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> . . . .
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> That's just something we don't need to put up with, nobody in this society needs to put up with, somebody violating their children. And they're all our children, just because they're born to some other family don't mean they're not our children. They're our children also and we have to protect them. And this won't really protect them because after six years, I know he's going to be back out. But while he's in there, he sure won't bother anybody's child. That's all I can say.

The trial court ordered the appellant to serve his entire sentence in confinement.

II. Analysis

The appellant contends that the trial court erred by considering enhancement factors to decide whether he should receive alternative sentencing because the length of the sentence had already been determined. He also contends that alternative sentencing was appropriate in this case because he served a significant sentence in Florida for similar episodes of abuse, received counseling and therapy while incarcerated, committed no additional offenses after he was released from prison, reported as a sex offender in the state of Michigan as required, and had already served six months in confinement for the present offense. The State argues that the trial court properly denied alternative sentencing. We agree with the State.

Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in her own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210; see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentence. See Tenn. Code Ann. § 40-35-401,

Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S. W.2d at 169.

For offenses committed prior to June 7, 2005, sentencing was governed by prior law, which provided that an appellant was eligible for alternative sentencing if the sentence actually imposed was eight years or less. See Tenn. Code Ann. § 40-35-117(b), -303(a) (2003). An appellant who was an especially mitigated or standard offender convicted of a Class C, D, or E felony was presumed to be a favorable candidate for alternative sentencing absent evidence to the contrary. See Tenn. Code Ann. § 40-35-102(6) (2003). The following sentencing considerations, set forth in Tennessee Code Annotated section 40-35-103(1), may constitute "evidence to the contrary":

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
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> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

State v. Zeolia, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996). Additionally, a court should consider the defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. See Tenn. Code Ann. § 40-35-103(5).

Regarding the appellant's claim that the trial court erred by considering enhancement factors when determining whether to grant his request for alternative sentencing, we disagree. As this court recently explained,

> Tennessee Code Annotated section 40-35-210(b) directs the trial court to consider evidence and information offered by the parties on enhancement and mitigating factors when imposing sentences. It does not indicate that these factors should only be considered when determining "the duration" of a sentence. Further, we have previously upheld the trial court's consideration of enhancement factors when denying an alternative sentence. See State v. Clifford Wayne Morris, No. E2005-01957-CCA-R3-CD, 2006 [Tenn. Crim. App. LEXIS 824], at *[*17-18] (Tenn. Crim. App., at Knoxville, Oct. 30, 2006) (holding the trial court properly applied one of two enhancement factors when denying the defendant an alternative sentence), no perm. app. filed.

State v. John Douglas Duke, No. M2007-00430-CCA-R3-CD, 2008 Tenn. Crim. App. LEXIS 493, at *15 (Nashville, May 30, 2008); see State v. Alexander Guzman-Chavez, No. M2006-01680-CCA-R3-CD, 2008 Tenn. Crim. App. LEXIS 356, **25-26 (Nashville, Apr. 10, 2008), perm. to appeal denied, (Tenn. 2008).

That said, the trial court improperly applied two of the four enhancement factors. First, although the particularly vulnerable enhancement factor may be used in child sexual abuse cases, the factor "relates more to the natural physical and mental limitations of the victim than merely to the victim's age." State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993). In other words, "[t]he factor can be used in [a child sexual abuse] case if the circumstances show that the victim, because of his age or physical or mental condition, was in fact 'particularly vulnerable,' i.e., incapable of resisting, summoning help, or testifying against the perpetrator." Id. In this case, the bathroom incident occurred when the victim was about twelve years old, and nothing indicates she was incapable of resisting, summoning help, or testifying against the appellant. The trial court also misapplied enhancement factor (7), that the appellant committed the offense to satisfy his desire for pleasure or excitement. Aggravated sexual battery requires that a defendant have "unlawful sexual contact with a victim." Tenn. Code Ann. § 39-13-504(a). Sexual contact is defined as an intentional touching of a victim's intimate parts or the clothing covering the victim's intimate parts, "if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." Tenn. Code Ann. § 39-13-501(6). Therefore, enhancement factor (7) may not be applied to a conviction for aggravated sexual battery or attempted aggravated sexual battery because it is also a necessary element of the offense. State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App. 1995).

Nevertheless, we conclude that the trial court properly denied the appellant's request for alternative sentencing. The appellant is a Range I, standard offender convicted of a Class C felony; therefore, under prior law, he is presumed to be a favorable candidate for alternative sentencing. However, the trial court was obviously very concerned about the appellant's lack of potential for rehabilitation. We agree. The appellant's psychosexual evaluation is, to say the least, troubling. According to the evaluation, the appellant was untruthful, showed a lack of remorse, and shifted responsibility for his actions. It concluded that he abused children for decades and that his risk to reoffend is high. In short, the assessment not only reflects poorly on the appellant's potential for rehabilitation, it seriously calls into question whether any potential for rehabilitation exists. Based upon that factor and the trial court's proper consideration of two enhancement factors, we conclude that the trial court did not err by ordering the appellant to serve his entire sentence in confinement.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of the trial court.

NORMA McGEE OGLE, JUDGE